

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1372

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P/S

To be argued by:
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

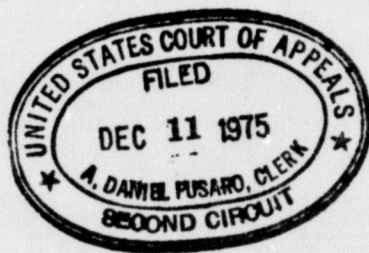
ANDRE GONZALEZ,

Appellant.

Docket No. 75-1372

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ANDRE GONZALEZ
FEDERAL DEFENDER SERVICES UNIT
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RICHARD A. GREENBERG,
Of Counsel.

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BARTELS, J.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.: CUNNINGHAM
(amended 6-26-75) ANDRE ---JOSE GONZALES		<div style="font-size: 2em; font-weight: bold; text-align: center;">CLOSED</div>
		For Defendant:
		Preminger, Meyer & Light
		66 Court St., Bklyn, NY
		834-8888

Did possess heroin

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		5/15/75	Notice of Appeal (re)		
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
5/8/75	Before COSTANTINO, J.- Indictment filed
5/15/75	Before BARTELS, J.- Case called- Deft and counsel Jerome Matedero present
	Interpreter Margarita Mensa sworn- Deft waives reading of the Indictment
	by the Court(indictment read to deft by Interpreter)- Deft enters a plea
	of not guilty- Deft's motion for in camera inspection of Grand Jury minutes
	by the Court - denied- Deft's motion for discovery - granted - Deft's motion
	for reduction of bail - granted - Bail set at \$10,000.00 surety bond
	status report set down for 6/24/75 at 9:30 A.M.
5-21-75	Before BARTELS J - case called - defts motion for reduction of
	bail argued - motion denied - status report set down for June 24,
	1975 @ 9:30 am.
6-6-75	Govts Notice of Readiness for Trial filed

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
6-9-75	By Bartels J - Order filed for expert services(Investigator Frank Steiner)		
6-24-75	Before BARTELS,J.- Case called - Deft and counsel present-Deft counsel reports that deft has retained new counsel		
6-26-75	Before BARTELS J - case called - deft & counsel present - court orders Martin Light substituted in place of Jerome Matedero as atty for the deft - Order on stipulation signed - trial set down for 8-4-75 at 10:00 am - court orders indictment amended to read ANDRE GONZALES in lieu of JOSE GONZALES		
6-26-75	By BARTELS J - Order on stipulation filed the the firm of Preminger, Meyer & Light be substituted in place of Jerome Mattadero, as attorney for the deft.		
7/1/75	Voucher for compensation of counsel filed		
7-21-75	Letter filed dated July 17, 1975 from Jerome Matedero, counsel for deft re above voucher etc.		
8/4/75	Before BARTELS,J.- Case called- Deft and counsel present-Trial ordered and begun-Jurors selected and sworn-Trial cont'd to 8/5/75		
8/5/75	By BARTELS,J.- Order of Sustenance filed. (dated 8/5/75)		
8-5-75	Before BARTELS J - case called - deft & counsel present - trial resumed - Govt rests - Deft rests - Jury retires for deliberation at 1:05 PM Jury returns at 4:50 PM with a verdict of guilty on all 4 counts of the indictment - jury discharged - defts motion to set aside the verdict is denied - defts motion to dismiss the indictment is denied - trial concluded - sentence adjd without date.		
8-8-75	Voucher for expert services filed.		
9-26-75	Before BARTELS J - deft & counsel Martin Light present - Interpreter Emil Rodriguez sworn - deft is sentenced for 5 years imprisonment on count 1 plus special parole term of 4 years; 5 years imprisonment on count 2 plus special parole of 4 years; 5 years on count 3 plus special parole term of 4 years; 5 years on count 4 plus special parole term of 4 years; to run concurrently with each other for a total of 5 years imprisonment and special term of 4 years. Court relieves Martin Light as counsel for the deft.		
9-26-75	Judgment & Commitment filed - certified copies to Marshal.		
9-26-75	Notice of Appeal filed without fee(Gonzalez)		
9-26-75	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.		
9-30-75	Certified copy of Judgment & Commitment ret'd and filed - deft. del. to Warden, MCC, NY.		

A TRUE COPY
ATTEST
DATED 11/11 1925
LEWIS OGEL
CLERK
BY [Signature]
DEPUTY CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

- against - :

~~JOSE~~ ^{ANDRE} GONZALES, :

Defendant. :

----- x

THE GRAND JURY CHARGES:

Cr. No. _____
(T. 21, U.S.C., §841(a)(1))

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

MAY 8 1975 ☆

TIME A.M. _____
P.M. _____

COUNT I

On or about the 16th day of January 1975 within the Eastern District of New York, the defendant, ~~JOSE~~ ^{ANDRE} GONZALES, did knowingly and intentionally possess with intent to distribute approximately 26.45 grams of heroin a Schedule I narcotic drug controlled substance.
(Title 21, United States Code, Section 841 (a) (1)).

COUNT II

On or about the 16th day of January 1975 within the Eastern District of New York, the defendant, ~~JOSE~~ ^{ANDRE} GONZALES, did knowingly and intentionally distribute approximately 26.45 grams of heroin a Schedule I narcotic drug controlled substance.
(Title 21, United States Code, Section 841 (a) (1)).

COUNT III

On or about the 5th day of March 1975 within the Eastern District of New York, the defendant, ~~JOSE~~ ^{ANDRE} GONZALES, did knowingly and intentionally possess with intent to distribute approximately 52.43 grams of heroin a Schedule I narcotic drug controlled substance.
(Title 21, United States Code, Section 841 (a) (1)).

COUNT IV

On or about the 5th day of March 1975 within the Eastern District of New York, the defendant, ~~JOSE~~ *Jose* GONZALES, did knowingly and intentionally distribute approximately 52.43 grams of heroin a Schedule I narcotic drug controlled substance.

(Title 21, United States Code, Section 841 (a) (1)).

David G. Trager

DAVID G. TRAGER
United States Attorney
Eastern District of New York

J. Hunt

FOREMAN

COURT'T CHARGE

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THE COURT: Ladies and gentlemen, you have listened most attentively to the testimony and to the summations. The testimony presents the facts and through the witnesses and exhibits as I outlined to you at the beginning of the case and the summations present the arguments of these attorneys, pro and con concerning those facts.

Now of course the time has come for you and me to perform our respective functions in the trial of this case. I noticed you have been very attentive. You have heard the voices of the attorneys and you have heard my voice and now your voice will be heard. I wish of course to extend to you my appreciation for

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your attentiveness and your alertness during the course of the trial and also my appreciation for any and all sacrifices which each and every one of you has made in your business or personal affairs in order to see that the ends of justice might be accomplished in this case.

You have been tolerant of the unavoidable delays and I noticed that all of you have been exceedingly interested in your task.

Every criminal prosecution is important to the Government of the United States and it is equally important to the defendant on trial. Each is entitled to equal justice at your hands and from my experience justice is best dispensed of in a calm and patient and careful deliberate manner and I sincerely request you to keep that attitude throughout your deliberations when you go into your Jury room.

Of course you should always respect the viewpoints of your fellow jurors and you should talk to each other with consideration and with intelligence and decide the issues of this case on the merits and the merits alone.

However, each juror should reach his own conclusion and no juror should surrender or compromise his or her own belief or conviction as to the innocence or guilt of the defendant.

1 The evidence consists of the testimony of the wit-
2 nesses and the exhibits admitted into the record. You
3 have heard all the evidence and you have heard all the
4 arguments of counsel and it becomes my duty now to give
5 you the law governing this case and as both counsel said
6 to you it is equally your duty to accept the law as it
7 is given to you by the Court, whether you like it or not,
8 and determine the facts of the case for yourself.
9

10 Now the proper application of the law to the case
11 to the facts in the case as you find those facts to be
12 will determine your verdict. I must emphasize again
13 that the sole responsibility and the sole power in deter-
14 mining the facts are with you and anything that I may
15 say or seem to say as to indicate any view or opinion
16 as to the facts is to be completely ignored by you.
17 In determining these facts you should not be influenced
18 by any rulings that the Court may have made on the trial.
19 Those rules simply deal with matters of law and not any
20 questions of fact. And of course the Court's rulings
21 on any objections made by either of these attorneys and
22 any questions which the Court may impose to any witness
23 are not to be considered by you as an indication of
24 either guilt or innocence of the defendant or any opinion
25 that the Court may have with respect thereto. And of

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1 COURT'S CHARGE

2 course the same is true with respect to any inflection
3 of the Court's voice relative to any such matter or in
4 connection with any comments or statements the Court
5 may have made to either of these attorneys.

6 It is very important that you must remember that
7 you're going to decide the facts. The Court has nothing
8 to do with that decision. You simply apply the law
9 that the Court tells you is the law in the case to those
10 facts. Now you may wonder why the Court asks witnesses
11 certain questions from time to time. Now the reason
12 was that some of the testimony raised some questions in
13 the Court's mind. I of course felt that those questions
14 might have also been raised in the minds of the Jury.
15 So for the sake of clarity and for that only were those
16 questions asked and they must not be deemed as any in-
17 dication of any opinion that the Court may have in this
18 case. The Court expresses no opinion as to the guilt
19 or innocence of this defendant. The determination of
20 such guilt or innocence is completely and exclusively
21 with you.

22 Well, there are certain general principals of law
23 which are of importance to every criminal case and I
24 wish to first make some statements which apply to
25 criminal cases in general after which I will endeavor

COURT'S CHARGE

to make clear to you what this particular case involves.

It is an established principal that an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any presumption or permit any inference of guilt against this defendant. Now it is also a principal in the law that every person charged with the commission of a crime is presumed to be innocent and the burden rests upon the Government to prove to your satisfaction beyond a reasonable doubt every element of the crime in that the party is guilty as charged. This presumption of innocence remains with the defendant all through the case until, if it is ever over-born by proof which satisfys you beyond any reasonable doubt that the presumption of innocence no longer remains with him. Thus we look at the evidence introduced in this case and you ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offenses have been committed as charged in the indictment. If you are so satisfied then it will be your plain duty to convict the defendant. But, if there exist in your minds a reasonable doubt as to this defendant's guilt, then you must give him the benefit of that doubt and acquit him. If there are two reasonable

1 conclusions equally supported by the evidence, one of
2 which is consistent with the guilt of the defendant and
3 one is consistent of innocence of the defendant then
4 you must adopt the conclusion consistent with the inno-
5 cence of the defendant and acquit him.
6

7 The question of reasonable doubt is one which can
8 be determined only by you. It cannot be determined by
9 arguments of counsel and in reaching this conclusion
10 with respect to reasonable doubt you must consider all
11 of the evidence together. Not just any particular seg-
12 ment or any particular portion of the evidence isolated
13 from the rest of the evidence.

14 The term reasonable doubt as used in this charge,
15 ladies and gentlemen, does not mean just any possible
16 doubt that you might have, but it means such a reasonable
17 doubt as a careful and prudent and reasonable man or woman
18 ought to entertain in the circumstances. It means a
19 doubt which is as indicated, is based on reason and
20 which is reasonable in view of all the evidence here.
21 The key word is reasonable.

22 Now reasonable doubt may arise from the evidence
23 produced or from the lack of evidence in the case. It's
24 the obligation of the Government to prove a defendant
25 guilty beyond a reasonable doubt but it is not the ob-

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1 ligation of the Government to prove a defendant beyond
2 a shadow of a doubt. It is impossible to prove anything
3 to an absolute certainty all beyond all possible doubt.
4 It is practically impossible for a person to be absolutely
5 sure and convinced of any controverted fact which, by
6 its nature is not susceptible of mathematical certainty.
7 A reasonable doubt does not mean a mere whim or imaginary
8 doubt, nor does it mean a possible doubt created by a
9 reluctance on the part of the juror to perform an un-
10 pleasant task. It means a doubt arising out of the evi-
11 dence or lack of evidence which is a reasonable doubt.
12 Now a reasonable doubt is a doubt that would cause a
13 prudent man to hesitate to act in matters of importance
14 to themselves. Now if a fair and impartial consideration
15 of all the evidence or lack of evidence you have a rea-
16 sonable doubt as to this defendant's guilt, then it is
17 your duty to acquit him. On the other hand if after a
18 fair and impartial consideration of all the evidence you
19 believe that you have no doubt that is reasonable as to
20 this defendant's guilt, then it is your plain duty to
21 convict him. One is said you have to be convinced in
22 a case of this kind beyond a reasonable doubt, when after
23 a fair and impartial comparison and consideration of all
24 the evidence one can conscientiously, he or she is con-

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vinced to a moral certainty of the proof of the charge. Thus you look at all the evidence introduced and you ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offenses have been committed as charged in the indictment. If you are so satisfied as I said before, then it will be your plain duty to convict this defendant. But, if there exists in your mind a reasonable doubt as to this defendant's guilt, of course you must give him the benefit of that doubt and acquit him.

Now the machine of trial calls for exercise of varying functions of counsel by the witnesses who testify, by the Court and the jury. You as the jurors will exercise the fact-finding function as I told you before and you will be the sole judges of the facts. You consider all the evidence, weigh the evidence and you draw the inferences from the evidence but only from the evidence. You must distinguish between mere arguments of counsel which have been made before you and the evidence upon which those arguments are based. However, arguments do not constitute evidence. You must carefully analyze the assertions which have been made to you by counsel for the defendant and also by the Government and ascertain what basis there is

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2 for these assertions. Now this brings us directly to
3 the charges in this indictment which I will read just
4 for the sake of clarification.

5 Count 1 of the indictment says that on or about
6 the 16th day of January, 1975, within the Eastern
7 District of New York, the defendant Andres Gonzalez did
8 knowingly and intentionally possess with intent to
9 distribute approximately 26.45 grams of heroin, a
10 Schedule 1 narcotic drug controlled substance in viola-
11 tion of Title 21, United States Code 841(a)(1).

12 Count 2 states that on or about the 16th day of
13 January, 1975, within the Eastern District of New York,
14 the defendant Andres Gonzalez did knowingly and inten-
15 tionally distribute approximately 26.45 grams of heroin,
16 a Schedule 1 narcotic drug controlled substance in viola-
17 tion of Title 21, United States Code, Section 841(a)(1).

18 Now we go to March 5th.

19 Count 3 says, on or about the 5th day of March,
20 1975 within the Eastern District of New York, the
21 defendant Andres Gonzalez did knowingly and intentionally
22 possess with intent to distribute approximately 52.43
23 grams of heroin, a Schedule 1 narcotic controlled drug
24 in violation of Title 21, United States Code 841(a)(1).

25 That brings us to Count 4 which is the last count.

COURT'S CHARGE

1 It says, on or about the 5th day of March, 1975, within
2 the Eastern District of New York, the defendant Andres
3 Gonzalez did knowingly and intentionally distribute
4 approximately 52.43 grams of Heroin, a Schedule 1 nar-
5 cotic drug controlled substance in violation of Title 21,
6 United States Code 841 (a) (1).
7

8 Thus, you see in effect these two transactions are
9 covered by four counts because the mere possession with
10 intent to distribute Heroin or Cocaine is an offense.
11 The distribution of sale as the case may be is also an
12 offense and therefore there are four counts in the in-
13 dictment and you must consider each count separately
14 and you must also consider the evidence against the de-
15 fendant separately as to each count.

16 Now this brings us to the statute which is allegedly
17 violated. As set forth in this indictment, Section 841
18 of Title 21 of the United States Code claims to have been
19 violated in all four counts of the indictment and it
20 reads as follows. Except as authorized by this subchapter
21 it shall be unlawful for any person knowingly or inten-
22 tionally 1, to distribute or to dispense or possess
23 with intent to distribute or dispense a controlled sub-
24 stance.

25 Now of course without more you wouldn't know what

1 COURT'S CHARGE

2 a controlled substance is. So we have to look back to
3 the provisions of the statute which describe a controlled
4 substance.

5 A controlled substance as used in this statute is
6 nothing more than a drug or substance mentioned in one
7 of the schedules which are set forth in Section 812
8 of Title 21 of the United States Code. Heroin is set
9 forth in Schedule 1 of that section. Consequently or
10 in other words that statute provides that it is unlaw-
11 ful to possess with intent to distribute or the unlaw-
12 ful distribution of heroin with knowledge that it is
13 heroin. It is also to be noted that the provision in
14 this statute is not limited to the sale of heroin, but
15 prohibits possession with intent to distribute any
16 amount of heroin, even though small, if possessed with
17 the intent to distribute.

18 Consequently one may violate the statute by knowing
19 and intentionally possessing with intent to distribute
20 any amount of heroin.

21 Now referring to the illegal possession with intent
22 to distribute a controlled substance such as heroin as set
23 forth in Count 1 and I think 3 of the indictment, Sec-
24 tion 841(a)(1), Title 21 of the United States Code
25 provides that it shall be unlawful for any person know-

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1 COURT'S CHARGE

2 ingly and intentionally to possess with intent to dis-
3 tribute a controlled substance such as heroin. I'm just
4 now talking about the possession of Heroin not the
5 distribution.

6 Now the elements of the offenses as set forth in
7 Count 1 as charged in Count 1 and 3 of the indictment
8 are, 1. That the defendant possessed a narcotic
9 controlled substance such as heroin with intent to
10 distribute the same and 2. That he did so intentionally,
11 willfully and knowingly.

12 In other words he has to know that he had heroin.
13 If he didn't know what it was, if it was another matter,
14 you decide that what the evidence shows in this respect.

15 Now the burden is upon the Government to prove
16 beyond a reasonable doubt to both of these elements and
17 the failure to prove either would be fatal to the pro-
18 secution and will entitle the defendant to a verdict of
19 acquittal on that particular charge.

20 Now let us go to the other counts. Referring to
21 unlawfully, willfully and knowingly distributing a con-
22 trolled substance such as heroin.

23 Hydrochloride as set forth in Count 2 and 4 of
24 the indictment, Section 841(a)(1) of Title 21 of the
25 United States Code provide that it shall be unlawful

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for any person knowingly or intentionally to distribute, such as a sale is distribution, a controlled substance such as Heroin hydrochloride. Now the elements of the offense as charged in Counts 2 and 4 of the indictment are 1. That the defendant distributed a narcotic controlled substance such as Heroin hydrochloride and 2. That he did so knowingly and willfully.

The burden is upon the Government to prove beyond a reasonable doubt both of these elements and the failure to prove either is fatal to the prosecution and entitles the defendant to a verdict of acquittal.

You must of course as I said before consider each count separately.

Well, let's talk a minute or two about intent and knowledge because that must be established in order to find that an offense has been committed.

The crimes charged in the indictments require knowledge and intent to commit the crimes.

Now obviously it is impossible to ascertain or prove directly what a man knew or what he intended. You cannot look into a man's mind and see what his intentions were or what he knew. But a careful consideration of the facts and circumstances shown by the evidence in any given case as to a particular person's ac-

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tions and statements enables us to, with a reasonable degree of accuracy know what his intentions were in doing or not doing certain things and what his state of knowledge was.

You cannot look into one's mind and ascertain knowledge. Knowledge and intent are descriptive of a state of mind and is not susceptible of direct proof. The proof of this element of knowledge and intent may rest on and frequently does evidence of facts and evidence of certain circumstances so in which it clearly appears as the only reasonable logical inference that a particular person or defendant knowingly and intentionally possessed with intent to distribute a quantity of heroin or actually distributed and sold a quantity of heroin knowing that it was heroin. In determining this knowledge and intent you may consider the intelligence or sophistication or lack of intelligence or sophistication of a particular person. Of course no person can intentionally avoid knowledge by closing his eyes to the fact that would lead a reasonable man to investigate. However, mere suspicion that something is wrong or improper is not equivalent to knowledge or intent. On the other hand the knowledge or intent may be inferred from the acts of the parties and is a ques-

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tion of fact to be determined from all the circumstances and the Jury may scrutinize the defendant's conduct at the time that the offenses were alleged to be committed. No person can disclaim knowledge by merely closing his eyes in which otherwise would have been obvious to a reasonable man. I am not going to attempt to outline any of the evidence in this case because it is exceedingly short and you will remember the testimony of the witnesses. I think you had three witnesses, that's all. So I won't make any effort to refer to their testimony. You will remember that testimony. Perhaps much better than I would in all events.

Anyway, I want to make it clear to you it is your remembrance and your recollection of the testimony that counts. That anything that I may have stated at any time with respect to any of the testimony of the facts is to be completely ignored by you because I will repeat I have no opinion whatsoever as to innocence or the guilt of this defendant.

Now the defendant by his plea of not guilty completely denies his guilt with respect to the allegations set forth in the indictment. He denies completely those transactions which I have read to you and as described in the indictment.

1 Now the defendant did not take the stand, but the
2 law doesn't compel a defendant to take the witness stand
3 and testify and no presumption of guilt may be raised
4 and no inference of any kind may be drawn from the fail-
5 ure of the defendant to testify. Nor should this fact
6 enter into your discussions or deliberations in any
7 manner whatsoever.
8

9 Also the law does not require the prosecution to
10 call as a witness all the persons who may have been
11 present at any time, place or involved in the case or
12 may appear to have some knowledge of the matters in
13 issue in this trial. Therefore this case rests upon
14 direct evidence and therefore I will not refer to or
15 give you instructions as to circumstantial evidence
16 unless hereafter you require it because I don't believe
17 there is a question of circumstantial evidence.

18 Now the important issue here I believe rests upon
19 the credibility of the witnesses and considering the
20 evidence you're going to have to exercise your exclu-
21 sive function of passing upon the credibility of the
22 witnesses. You can see this is a very important func-
23 tion because determining where the truth is is a neces-
24 sity to decide, whether or not the witnesses were tel-
25 ling the truth. How are you going to do this. This is

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going to be left to your own determination. In determining the credibility of a witness a juror may consider his motives in testifying, his or her manner and demeanor on the witness stand. His interest, his prejudices his biases if any and whether he has a purpose to serve which might or might not have colored his testimony. Interest does not necessarily mean that a witness is untruthful. It's merely an element you may consider in reaching a determination upon the question of whether or not he is telling the truth. You consider the witness' demeanor when he gets on the witness stand. To use a colloquial expression, you size him up, look him over as they say and decide how he strikes you as a fair and candid witness. Whether he strikes you as a person who is not telling the truth for some reason or another. You may consider this witness' intelligence. You can consider his state of mind. His ability to observe the matters to which he has testified and whether he impresses you as having a fair and accurate recollection of those matters. You can consider the inherent probabilities or improbabilities of a witness' testimony. Another consideration is whether or not the witness has been contradicted by other credible witnesses or whether or not he has made some statement at other times and

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places under oath that are otherwise contradicted or contrary to those made by him on the witness stand. Of course when you have an inconsistent statement or a conflict you must determine whether it relates to a material or essential portion of his testimony or it refers to an immaterial or unimportant detail of his story. You decide what is important and what is not important, regardless of any statement made to you by counsel.

Of course a juror is not bound to believe an inherently improbable or unreasonable statement made by any witness just because the witness happens to be under oath. The Jury has a right in appraising a particular witness' credibility as to all or part of his testimony to consider the probability or improbability of that testimony when viewed in the light of all circumstances and in the light of any other evidence in the case.

Now we have as you remember a person by the name of Robert Henderson. He was an expert.

Now the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education or experience have become expert in some art or science

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1 or professional calling. They are allowed to state an
2 opinion as to a relevant and material matter which they
3 profess to be an expert and they may also state their
4 reasons for the opinion. Of course you can consider
5 each expert's opinion received in evidence, you give it
6 such weight as you may think it deserves and you decide
7 what that is and if you decide that an opinion is one
8 not based upon the profession, education or if the rea-
9 sons given to support the opinion are not sound, you
10 may reject that opinion completely. You will recall
11 that Robert Henderson was called as an expert to testi-
12 fy as to the analysis he made of a substance, allegedly
13 purchased from the defendant on two different occasions
14 and you will recall that he testified he made this
15 analysis and he found that it was Heroin.

16
17 Now you can accept that testimony or you can re-
18 ject it. It is up to you. It will be for you to
19 determine whether a witness, whoever he is is telling
20 the truth as to all the facts or only with respect to
21 some of the facts or whether he is telling the truth
22 at all. A test of whether you believe a witness is
23 the same test that you ladies and gentlemen would apply
24 in your everyday business or home affairs when you are
25 called to make a similar type determination from time

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1 to time. You must not think, members of the Jury, when
2 you came into this Jury box as sworn jurors you are
3 suppose to lie aside your everyday experiences. That is
4 not so. Indeed you are now being called upon to use
5 that business or everyday experience to assist you in
6 determining who or whether or not a particular witness
7 is telling the truth. You're to be the exclusive judges
8 in determining where the truth lies.
9

10 Now you have been chosen as sworn jurors in this
11 case to try the issues presented by the allegations in
12 the indictment and it is denied by the not guilty plea
13 of this defendant. Your verdict will be without pre-
14 judice and without bias and without sympathy. You are
15 the fact finding body and it is your duty to decide
16 whether the acts charged in the indictment have been
17 committed by this defendant beyond a reasonable doubt.
18 You are to perform this duty without fear or without
19 bias or without prejudice to any party. The law does
20 not permit jurors to be governed by fear or by bias
21 or sympathy or prejudice or by public opinion.

22 In arriving at your decision you should consider
23 the evidence in light of your own experiences and by
24 the exercise of your own knowledge and common sense.
25 You must not permit any sympathy to enter your view or

1 public opinion. You will carefully and impartially con-
2 sider all the evidence and you will follow the law as
3 stated by the Court and you will reach a just verdict,
4 regardless of the consequences. I will just say one
5 other statement about your recollection of the evidence,
6 because it is your recollection of the evidence that
7 will count. It's not anything that I have said that
8 should have any bearing on your determination as to
9 what the evidence shows. If an attorney or either of
10 them have mis-stated any testimony you must disregard
11 those mis-statements. It is your recollection of the
12 testimony that is going to control in your deliberations.
13 In conclusion I would say that it is your duty to weigh
14 this evidence dispassionately, carefully and calmly and
15 to reach a conclusion about this case as to the facts
16 which are wholly within your findings. The only question
17 for your consideration whether this defendant is guilty
18 or innocent of the offenses for which he is now on
19 trial.
20

21 If you are satisfied beyond a reasonable doubt
22 that he is guilty, it is your plain duty to convict him.
23 On the other hand if you have a reasonable doubt about
24 the matter it is equally plain your duty to acquit him.

25 The punishment provided by law if the defendant is

1 COURT'S CHARGE

2 found guilty is a matter exclusively within the province
3 of the Court. You cannot and you should not allow con-
4 sideration of any punishment which may be imposed upon
5 this defendant if he is found guilty, to influence you
6 in arriving at an impartial verdict as to the guilt or
7 innocence of the defendant.

8 It is for the Court to determine the mitigating
9 or other special circumstances which I will consider in
10 the case if the defendant is found guilty. So you should
11 not be concerned with the question of punishment.

12 Now ladies and gentlemen, all 12 of you must
13 agree whichever way you find. In other words your ver-
14 dict must be unanimous. Take each count of the indict-
15 ment separately and you must determine the guilt or
16 innocence of this defendant with respect to each count.

17 The form of your verdict should be, "We the Jury
18 find the defendant Andres Gonzalez not guilty on
19 Count 1," or, "We the Jury find the defendant Andres
20 Gonzalez guilty on Count 1," and thus you repeat this
21 procedure as to the other three counts and you will
22 return a verdict of guilty or not guilty on each count
23 with respect to this defendant.

24 Now if you wish, if you wish any of the testimony
25 of any of the witnesses to be read to you or if you have

1 COURT'S CHARGE

2 any further questions, please send in a note to the
3 marshal who will relay your request to me. Now, I
4 know jury service is not always pleasant and quite fre-
5 quently it is very inconvenient, but jury service is one
6 of the keystones of our system of American justice in
7 a democratic form of government. I want to thank you
8 again for your devotion as citizens to this important
9 work as jurors and acting in accordance with the evidence
10 and with the laws as I have charged you by your verdict
11 declare the truth and proclaim the cause of righteous-
12 ness and justice in this case. If you desire to examine
13 any of the exhibits they will be delivered to you upon
14 request if after you retire you desire to be informed
15 on any point of law arising in this case or to have any
16 part of the testimony clarified or should you ask to
17 be returned to the Courtroom, you should then ask to be
18 returned to the Courtroom for further instructions.

19 Now at this point I have to take five minutes in
20 order that I may hear applications to be made by counsel.
21 It will be a very, very short five minute recess. I
22 request you do not consider this case until you go back
23 into the Jury room at the end of the break. In other
24 words, you are not free to talk about the case yet.
25 You're very close to it, but not yet and I will take

1 this opportunity to discharge the alternates. I will
2 thank you very much. They are an assurance against a
3 sickness or a failure of jurors who have not shown up.
4 Thank you very much. We'll ask the Jury then to go to
5 the Jury room.
6

7 (Jury excused.)

8 THE COURT: What do you say gentlemen, on the
9 record, do you have any requests, objections, exceptions?

10 MR. CUNNINGHAM: No, Your Honor.

11 MR. LIGHT: Very nice charge.

12 THE COURT: Call them back.

13 (Jury enters box.)

14 THE COURT: Well ladies and gentlemen, there are
15 no further instructions for me to give you and you may
16 now return to your Jury room and immediately begin
17 deliberating upon the issues involved.

18 Your lunch will be here I'm told within the next
19 10 or 15 minutes at the most. But you need not wait
20 for your lunch to deliberate. You may begin immediately.

21 (Whereupon, the Jury retired to deliberate at
22 1:08 P.M.)

23 (Whereupon, the United States Marshal was sworn
24 to guard the Jury.)

25 (Jury excused.)

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(At 2:50 p.m., the following occurred without the presence of the jury.)

THE COURT: Just make a note, Mr. Reporter, that ever since 2:30 we have been attempting to get counsel for the defendant here in order to be present while certain portions of Mr. Balmer's testimony is to be read to the jury;

That Mr. Light, although knowing what I had told him and to come over from 16 Court Street, which is five or ten minutes away, the most, he has not yet appeared at five minutes to three.

At one time he was willing to waive, at least he told the Deputy Courtroom Clerk, that he would waive being present at the hearing of the testimony, or the reading of the testimony.

Now, everyone is here and ready, we are ready to read that testimony, but Mr. Light is still not present.

I just want the record to show that fact.

All right.

Let us see, Court's Exhibit 2, jury note requesting portions of Mr. Balmer's testimony to be read back.

(At this point, Mr. Light entered the courtroom.)

THE COURT: It is now five minutes to three.

You know, you can't waste our time here, you will stay here until there is a verdict rendered. I'm not going to be put to this inconvenience and neither should twelve jurors.

Now, call the jury in.

(The jury then took its place in the jury box.)

THE COURT: I have a note here from the jury which reads:

"We would like to have the part of Mr. Balmer's testimony dealing with the obtaining of Mr. Gonzalez' driver's license."

We have been able to find it and the reporter will read it to you.

Do you mind reading it, Mr. Karr?

(At this point, the reporter read the testimony dealing with the obtaining of a driver's license for the defendant.)

THE COURT: Is that enough?

THE FOREMAN: That is enough.

THE COURT: Thank you very much, ladies and gentlemen.

(At 3:20 o'clock p.m., the jury left the courtroom to continue its deliberations.)

1 THE COURT: The jury will leave now.

2 (At 6:00 o'clock p.m., the jury left the
3 courtroom.)

4 THE COURT: Yes?

5 MR. LIGHT: Your Honor, I am familiar of case
6 law in the State, I am not up-to-date with Federal,
7 but when an informant is present and makes an
8 introduction and partakes in a conversation relative
9 to the purchase of drugs, then his identity has to
10 be disclosed and the defendant has the right to call
11 him as a witness if he so desires.

12 THE COURT: I don't know whether there are
13 cases to that effect.

14 MR. CUNNINGHAM: I never heard of that.

15 THE COURT: I never heard of that.

16 MR. CUNNINGHAM: I do know, your Honor,
17 during the purchase and sale, the informant was never
18 present when there was a purchase and sale, only
19 present during the introduction.

20 MR. LIGHT: But they discussed narcotics.

21 MR. CUNNINGHAM: That is perfectly fine.

22 THE COURT: That is perfectly all right.

23 MR. LIGHT: Well --

24 THE COURT: As a matter of fact, you will
25 recall in a recent decision of the Court of Appeals

1 it stating that where an informant testifies you
2 may exclude the public; it shows that an informant
3 has certain rights to be protected.

4 I see no reason why the testimony of the
5 informant is necessary in any way to preserve the
6 defendant's rights.

7 If you can point out to me that it is
8 absolutely necessary, I will certainly see that
9 there is every effort made to bring him in. But
10 from the mere introduction of this man, and he
11 cannot testify to a purchase, I think it is just
12 petty fogging.

13 MR. LIGHT: It goes to more than that, this
14 witness testified --

15 THE COURT: Wait, he has a verdict.

16 Do you have a verdict?

17 MR. CUNNINGHAM: Yes, your Honor.

18 THE COURT: All right, we will be through
19 very shortly.

20 MR. LIGHT: Judge, this witness testified
21 that the first time he ever heard the name Andres
22 was this morning or yesterday, he didn't hear from--

23 THE COURT: Unless you give me cases, I'm
24 not going to take it.

25 MR. LIGHT: Judge, can I just finish? I am

1 preserving the right of the defendant.

9 2 THE COURT: You continue to argue after the
3 Court has ruled.

4 I think this is only a certain amount of
5 petty fogging that goes on to delay the case.

6 I have ruled, I see no reason unless you give
7 me precedents and show that it is necessary for this
8 man's testimony. Whatever has already gone forward
9 is not proof, and you are not going to argue with me--

10 MR. LIGHT: Judge, his testimony shows that.

11 THE COURT: I know, but that is not proof --

12 MR. LIGHT: Okay.

13 THE COURT: That is argument.

14 MR. LIGHT: That is not argument, I just want
15 to preserve the record, I want to preserve it.

16 THE COURT: I know the proof as well as you,
17 I heard it.

18 MR. LIGHT: If the case goes up to the Court
19 of Appeals, the Court of Appeals hasn't heard it
20 because you won't permit me --

21 THE COURT: The Court of Appeals, the Court
22 of Appeals?

23 MR. LIGHT: They go by the record in this
24 court.

25 THE COURT: Your argument is zero.

1 MR. LIGHT: Okay, sir.

10 2 THE COURT: You are arguing it, it is in the
3 record.

4 MR. LIGHT: But if you don't let me put it on
5 the record --

6 THE COURT: There is nothing to put on the
7 record, any facts, on the record.

8 You are just skipping around, again and again
9 and again, it is like going on a merry-go-round or
10 a carrousel.

11 I know what the testimony is here and unless
12 you can bring in some evidence or some cases --
13 wait a minute, I don't know what Mr. Cunningham is
14 doing, I'm arguing with you -- maybe you are right,
15 maybe we had better bring him in.

16 You give me cases, both of you.

17 MR. CUNNINGHAM: As far as supplying a
18 confidential informant's name?

19 THE COURT: Yes.

20 MR. CUNNINGHAM: May I make one statement for
21 the record?

22 Let the record indicate that defense counsel
23 was given the entire Gonzalez file, every document
24 known to the Government was handed to him.

25 MR. LIGHT: I asked him to make photostats,

1 he wouldn't let me.

11 2 THE COURT: We have no such trouble with
3 other lawyers, let the record show that.

4 Now, you are not fooling anybody, you are just
5 fooling yourself.

6 MR. CUNNINGHAM: You could have made all
7 the notes you wanted to.

8 THE COURT: Very well, gentlemen, tomorrow
9 morning.

10 (At 6:10 o'clock p.m., a recess was taken.)

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CERTIFICATE OF SERVICE

December 11, 1975

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Richard A. Greenberg